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JOHN F. DAVIS, CLERK

No. 452

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

RICHARD JEWELL NEWLAND,

Petitioner,

vs.

THE STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

DEAN E. RICHARDS,
156 E. Market 4th Floor
Indianapolis, Indiana
Counsel for Petitioner.

PALMER K. WARD
919 Electric Building
Indianapolis, Indiana
Of Counsel

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

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No.

RICHARD JEWELL NEWLAND, *Petitioner,*

vs.

THE STATE OF INDIANA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

To the Chief Justice of The United States and the Associate Justices of The United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Supreme Court of Indiana which affirmed the judgment of the lower court denying petitioner leave to file a belated motion for new trial and remanding him to prison for the remainder of his natural life.

THE OPINION BELOW

The opinion of the Supreme Court of Indiana in this matter is reported at 236 NE2d 45, but it is not as yet reported in the official reporter of the Supreme Court of Indiana. A copy of the opinion is hereto annexed in

Appendix A. A Petition For Rehearing was filed and denied as is shown by Appendices B & B-1.

STATEMENT OF JURISDICTION

The decision and judgment of the Indiana Supreme Court was entered on April 22, 1968. The petitioner's Petition For Rehearing was filed on May 10, 1968 within twenty days of the Supreme Court of Indiana's decision as required by rule and it was denied on June 12, 1968.

That statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Whether it constitutes "equal protection of the law" as required by *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963) and *Griffin* v. *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891 to create a *coram nobis* appeals procedure which permits pauper convicts to have their complaint heard on the merits by the appellate tribunal in all cases but which places convicts who do not qualify for pauper status totally at the mercy of the original trial court upon its arbitrary determination without guidelines as to whether due diligence has been exercised by the moving party.

2. Whether it constitutes an adequate implementation of this Court's dictates regarding Indiana's *"coram nobis"* appellate system which were expressed in *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963) which held that the Public Defender could not become an appellate tribunal of last resort unto himself,

to create a *"coram nobis"* procedure which empowers trial courts to reject all matters which were not raised in an original motion for new trial which could have been raised in that motion on the ground that failure to raise it originally is lack of due diligence *per se* without further inquiry.

3. Whether it constitutes an adequate implementation of this Court's dictates regarding Indiana's *"coram nobis"* appellate system which were expressed in *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963) which held that the Public Defender could not become an appellate tribunal of last resort unto himself, to create a post conviction procedure which makes a criminal defendant's trial counsel undertake the very rule which this Court has held could not be vested in the Public Defender and which this Court impliedly has held could not be vested anywhere other than the appellate tribunal itself.

4. Whether *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed 2d 892, 83, S.Ct. 768 (1963) should be reconsidered in the light of the fact that its holding was based upon an incorrect understanding of the facts of the then existing Indiana system of appellate procedure and it has compelled the creation of an unconstitutional usage embodied in Rule 2-40 and 2-40A of the Supreme Court of Indiana.

5. Whether a usage embodied in Rule 2-40A of the Supreme Court of Indiana which was prompted by *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 892, 83 S.Ct. 768 (1963) deprives all appellants of the due process of law in that *Lane* v. *Brown* has compelled the Supreme Court of Indiana to adopt a screening process in order to avoid an inundation of its docket which screening process is based upon a doctrine of implied waiver which is in direct

derogation of the waiver-of-fundamental-rights doctrine put forth by the United States Supreme Court in a companion case to *Lane* v. *Brown*, that is, *Fay* v. *Noia*, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV, Section 1.

RULES AND USAGES BEING QUESTIONED

In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of the filing of such motion, and as assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently.

Rule 2-6, Supreme Court of Indiana

Hereafter no court shall have jurisdiction to entertain any action for a writ of error *coram nobis* in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefor is alleged to have orig-

inated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived. Trial counsel representing a defendant or the defendant *pro se* shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this Court. If no timely motion for a new trial is filed by a defendant's trial counsel or by the defendant *pro se*, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiesence in, and an acceptance of, the judgment of the trial court by the defendant.

Rule 2-40, Supreme Court of Indiana
(1st two paragraphs)

Rulings of petitions to file belated appeals, rulings on petitions to file belated motions for a new trial and rulings on belated motions for new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for a writ of certiorari in the Supreme Court of this State.

A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the attorney general at the time of filing. To this petition the attorney general shall file a response under oath, admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, together with brief in support thereof. If there is a conflict as to the statement of the record below, this Court may direct the clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this Court.

If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evi-

dence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

It shall be the duty of the public defender or the State of Indiana to represent indigent persons who are inmates of penal institutions of the State of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petition for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after dilligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the public defender to represent any petitioner in such cases (as provided by Rule 2-40), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this Court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this Court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the Court shall determine whether or (sic) not an order shall issue requiring the public defender to represent the petitioner.

In the event proceedings are in *forma pauperis*, no costs shall be taxed against petitioner for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

The petition and brief for writ of certiorari shall be filed within sixty (60) days after the rulings complained of and the response thereto within thirty (30) days after the filing of the petition for the writ. The petitioner may file a reply brief within ten (10) days after the filing of response. No other briefs or pleadings shall be filed. Six (6) copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

The Court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

Provided further, that where the petition for the writ does not meet with the rules of this Court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

Rule 2-40A, Supreme Court of Indiana

STATEMENT OF THE CASE

On December 6, 1965 the petitioner was convicted in Division One of the Criminal Court of Marion County, Indiana of the crime of manslaughter and thereafter he was sentenced to a term of not less than two nor more than twenty-one years in the Indiana State Penitentiary. From this conviction a direct appeal was taken which has no relevance to this petition.

On September 12, 1967 the petitioner filed a Verified Petition to File A Belated Motion For New Trial relating to his aforesaid conviction. Tendered with this Verified Petition pursuant to the rules of the Supreme Court of Indiana was a Belated Motion For New Trial alleging that new and pertinent evidence had been discovered three days earlier and an affidavit of one L. C. Wilson which read as follows:

L. C. Wilson, being first duly sworn upon his oath, deposes and says:

That I now am and was on October 16, 1963 a resident of the State of Indiana and County of Marion. I now live at 609 E. 20th Street, Indianapolis, Indiana.

About four years ago, in the afternoon, I was standing in front of a record shop known as "Johnny

P's". This record shop was in the 1800 block of North College Avenue, Indianapolis, Indiana. I noticed a lady who ran out in the street and then she came over to where I was standing in front of the record shop. She told me and John Pierce, Jr., the fellow who ran the record shop, that she had been shot. She was with another lady. John Pierce, Jr. told her to come into the record shop and sit down which she did. The lady who was with her came into the record shop and stood beside her. While they were in there I saw the lady who said she had been shot take a knife or dagger out of her blouse and hand it to the lady who was with her. I didn't see what this lady then did with this knife as it got very crowded in there because of the excitement. I didn't know these two ladies and I don't know them now.

I work for Erbrich Products Company at 1120 E. 32nd Street, Indianapolis, Indiana. I work in packing and shipping for them and they are a food products company.

The record shop is no longer in business and John Pierce, Jr., known as "Johnny P" is now deceased.

(jurat) L. C. Wilson

L. C. Wilson

On October 10, 1967 the local prosecuting attorney answered the aforesaid Verified Petition To File Belated Motion For New Trial contending that the newly discovered evidence related in the tendered Belated Motion For New Trial was merely "cumulative" and would not have changed the outcome of the original trial if it had been presented at that time. The prosecutor's entire response went to the merits of the tendered Belated Motion For New Trial and it did not relate to the merits of the petition to file same. In his said petition the petitioner alleged that he had been duly diligent in seeking out and discovering the said evidence and in bringing it to the attention of the trial court immediately after its dis-

covery. In its response the State of Indiana did not contend otherwise and the question of due diligence was never argued before the trial court.

On February 7, 1968 there was an oral argument on the Petitioner's Verified Petition To File Belated Motion For New Trial and the trial court at that time overruled same and denied leave to file the tendered Related Motion For New Trial.

A portion of Indiana Supreme Court Rule 2-40 which is not quoted above because that portion of the rule is not under attack herein provides as follows:

> The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.
>
> **Rule 2-40, Supreme Court of Indiana (third paragraph)**

The clear mandate of the above-quoted portion of Indiana Supreme Court Rule 2-40 is that a Verified Petition To File Belated Motion For New Trial may be denied only where there is a finding that due diligence was not exercised. Here the question of due diligence had not even been placed at issue in the trial court but, nonetheless, when the petitioner filed his Petition For Certiorari in the Indiana Supreme Court pursuant to the previously quoted Rule 2-40A on February 9, 1968, two days after the adverse ruling by the trial court, the Attorney General of the State of Indiana responded on March 11, 1968

with the only ground that could be presented in justification of the trial court's ruling: "That Petitioner has failed to show that he exercised due dilligence as required by Rule 2-40." Cited in support of this allegation was the Indiana Supreme Court's decision in *Langley* v. *State*, ... Ind. ....., 232 NE2d 611 (1968) (an appeal from which decision was docketed in this Court on June 18, 1968.)

On April 22, 1968, in the decision appearing hereinafter in Appendix A, the Indiana Supreme Court, by and through three of its justices, ruled that it could not disturb the trial court's discretionary determination as to whether the petitioner had exercised due diligence—this, in spite of a record which showed that the trial court had not even considered the matter of due diligence. The other two justices of the Indiana Supreme Court concurred in the result, recognizing that the present appeals system in Indiana renders it impossible to afford appellate relief if the trial court refuses permission to file a belated motion for new trial and noting that the petitioner's attempted appeal, in the light of the said rules and usages thereunder, was "a useless exercise in futility for both the petitioner and this (The Indiana Supreme) court."

ARGUMENT

The statement of facts in this case truly should begin with this Court's decision in *Lane* v. *Brown*, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963) where it was held that it constituted an unconstitutional denial of equal protection of the law to make a pauper's right to have a pauper transcript of his original trial contingent upon the approval of the Public Defender of the State of Indiana.

The concurring opinion of Justice Clark in *Lane* v. *Brown* demonstrates that this Court was operating under a misconception as to the mechanics of Indiana *coram nobis* procedure when the said decision was rendered:

> I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial.
>
> *Lane* v. *Brown*, 372 U.S. at 485, 9 L.Ed. at 898.

The Public Defender of the State of Indiana never has had any connection with defenses at the trial level and, in directing itself to the problem of a defendant's trial counsel, being in a position to foreclose his client from undertaking an appeal by acting as an appellate court unto himself, the *Lane* v. *Brown* decision directed itself to a problem which did not exist at the time. Ironically, however, the steps which the Indiana Supreme Court has taken in the light of the *Lane* v. *Brown* decision have created the very situation which this Court apparently thought it was eradicating in *Lane* v. *Brown*.

The Indiana Supreme Court, by its Supreme Court Rules and by its decisions has created the presumption

that any possible appellate questions, however much they may involve a violation of fundamental rights, are to be deemed waived by a convicted accused unless they are presented with exactitude in a Motion For New Trial within thirty days after conviction (See Rules 2-6 and 2-40, Supreme Court of Indiana as set forth in the Rules and Usages Being Questioned section of this petition) and such a waiver is to be presumed because it is further presumed that competent trial counsel will file an adequate motion for new trial if such a motion is appropriate:

> As judges, who as lawyers have engaged in trial work, we know that competent trial counsel, can, should and will make adequate notes and memoranda during trial for use in preparing a motion for a new trial.
>
> . . . a pauper and a rich man alike are bound in this state by the action or non-action of competent trial counsel. So far as we can find, that principle is true in federal courts if there is a failure to file a motion for a new trial within five (5) days. . . .
>
> *State ex rel. Macon* v. *Orange Circuit Court* ..... Ind. ....., 198 NE2d 229 (1964).

This approach to the problem is entirely contrary to the doctrine of implied waiver which was expressed in this Court's opinion in *Fay* v. *Noia* which was decided the same day as *Lane* v. *Brown*:

> The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 ALR 357—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a *habeas* applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims

> in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on *habeas* to deny him all relief.
>
> *Fay* v. *Noia*, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837, 869 (1963)

Contrary to the manifest dictates in *Fay* v. *Noia* the doctrine of "implied waiver" has become a very prominent means of disallowing appeals in Indiana and contrary to the manifest dictates of the above-quoted separate opinion in *Lane* v. *Brown* disallowances occur as an automatic result of the action or inaction of trial counsel subsequent to conviction.

In petitioner's case the Indiana Supreme Court's implied-waiver theory was carried to an extreme. The petitioner was held to have impliedly waived his right to present newly discovered evidence by his failure "to exercise due diligence." Petitioner's failure "to exercise due diligence" in turn was implied solely from the trial court's decision denying him leave to file his Belated Motion For New Trial and this later inference was based solely on the fact that a lack of due diligence was the only legal ground which the trial court could have invoked such a denial under the provisions of Ruly 2-40, Supreme Court of Indiana (third paragraph) supra, and this latter inference was drawn notwithstanding the fact that the matter of due diligence had not been at issue in the trial court proceedings. The said inference was based, in short, upon what the two concurring justices of the Indiana Supreme Court in their decision herein characterized as "some child-like faith in the inherent wisdom of that (the trial) court." (See Appendix A)

Rule 19 of this Court outlines the "considerations governing review on certiorari" and includes among those types of cases in which the granting of certiorari is likely to be deemed appropriate, cases "where a state court has decided in a way probably not in accord with applicable decisions of this court." At issue here is the constitutionality of the implementation of the dictates of this Court in *Lane* v. *Brown* by the Indiana Supreme Court. The petitioner's contention that *Lane* v. *Brown* has not been properly implemented is a highly probable one in view of two manifest facts: 1) *Lane* v. *Brown* was based upon a misapprehension of Indiana's post conviction procedures and the "reforms" which have taken effect since *Lane* v. *Brown* have brought into being the very situation which the *Lane Brown* decision mistakenly believed to exist and intended to eliminate; 2) Two of the five judges of the Indiana Supreme Court state flatly in the decision herein that the Supreme Court Rules which were brought into being as a result of *Lane* v. *Brown* are much in need of change. In view of the obvious confusion inherent in the *Lane* v. *Brown* decision itself and manifest in the changes in Indiana appeals procedure which have resulted from that decision, petitioner believes it to be essential that there be some pronouncement and clarification by this Court on the matters which it attempted to resolve in *Lane* v. *Brown* before any additional experiments or changes are undertaken by the Indiana Supreme Court.

Petitioner's standing to raise this issue and seek the benefits of such a clarification is based upon the fact that he has been victimized by the changes wrought by *Lane* v. *Brown* in that he, who is not a pauper defendant, has lost the *coram nobis* rights which he would have had prior to *Lane* v. *Brown* and the amendment to Rule 2-40 and the enactment of Rule 2-40A by the Indiana Supreme

Court while pauper defendants now enjoy those rights. Prior to *Lane* v. *Brown* the petitioner could have filed his Belated Motion For New Trial (or *coram nobis*) without leave of court and obtained an adjudication on the merits both in the trial court and on appeal. Under the present appeals system in Indiana he remains totally at the mercy of the trial court as two justice of the Indiana Supreme Court have noted herein. Prior to *Lane* v. *Brown* a pauper defendant who had need of a transcript to vindicate his *coram nobis* rights was totally at the mercy of the Indiana Public Defender. Under the present appeals system in Indiana a pauper defendant can have the merits of his *coram nobis* brought to the attention of a court other than the court in which he was convicted, *i.e.* the Indiana Supreme Court, in any case where the Public Defender fails to take action. No such remedy is open to a solvent defendant as he is totally at the mercy of the court in which he originally was convicted. (See Rule 2-40A, Supreme Court of Indiana, fourth paragraph, set forth in Rules and Usages Being Questioned section of this petition.) Petitioner believes that the denial of equal protection which is inherent in this system is manifest and that he is entitled to at least those remedies afforded pauper convicts on "equal protection" grounds and that he and pauper convicts alike are entitled to not be subjected to the implied-waiver doctrine repeatedly resorted to in the Indiana appeals system on due process grounds.

CONCLUSION

For the reasons above stated, especially by the Indiana Supreme Court's pronouncement that petitioner has "waived" his rights to present newly discovered evidence and that the Indiana Supreme Court must exercise a "child-like faith in the inherent wisdom of the trial court" it is urged that petitioner has been denied his constitutional rights as described above.

It is therefore respectfully submitted that Certiorari should be granted and that the decision of the Indiana Supreme Court should be reversed, or in the aternative, that this Court should vacate said judgment and remand this cause to the Indiana Supreme Court for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

DEAN E. RICHARDS.
Counsel for Petitioner

PALMER K. WARD
Of Counsel

APPENDIX A

BOTH DECISIONS (MAJORITY AND CONCURRING)

IN THE

SUPREME COURT OF INDIANA

No. 268S23

RICHARD JEWELL NEWLAND,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

WRIT OF CERTIORARI

(Filed April 22, 1968)

PER CURIAM

This matter was initiated by the filing of a verified petition for a writ of certiorari. The issue before this court is whether the trial court erred in refusing permission to petitioner to file a belated motion for a new trial.

Under the rules of the Supreme Court of Indiana, Rule 2-40 is applicable. The pertinent part thereof, reads as follows:

> "• • • the petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due dilligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial. • • •"

In the recent case of *Langley* v. *State of Indiana,* (1968) 12 Ind. Dec. 419, 232 N.E.2d 611, Chief Justice Lewis, citing Rule 2-40 *supra,* pointed out that the determination of whether due diligence has been established, rests in the sound discretion of the trial court. In the *Langley* case, *supra,* the case of *Barrett* v. *State of Indiana,* (1952) 230 Ind. 533, 105 N.E.2d 508, was cited and the rule therein endorsed which is set forth in the following quotation:

> "It is necessary that an appellant show, through happenings or events which have no connection with the actual trial, and which have not been brought about by the fault of the litigant, that his time for filing such motion has expired, and that, because of the happenings or events, it was impossible for him to perfect the record for an appeal. Whether or not appellant was diligent in attempting to file his motion for a new trial is a question of fact for the trial court. The determination of whether diligence has been established rests in the sound discretion of the trial court, subject to review by this court on appeal. The burden of proof was appellant's. He failed to sustain such burden."

In a petition for permission to file a belated motion for a new trial, the trial court has discretion in ruling upon the petition and may be reversed only for abuse of that discretion, and this rule applies when the trial judge determines whether the petitioner exercised due diligence in filing the petition. *Barrett* v. *State, supra.*

In the petition for certiorari petitioner has not shown how the trial judge abused his discretion. Furthermore, the petitioner's mere allegation that he, in fact, used diligence is insufficient in the face of the previous determination of the trial judge.

The petitioner has cited the case of *Commonwealth* v. *Nassar,* (1966) ....., Mass ....., 218 N.E.2d 72. A review of the holding of the court in this case does not bear out the purpose for which it was cited. In the *Commonwealth*

v. *Nassar* case, *supra*, the court, under a specific Massachusetts statute, stated:

> "In a capital case this court has 'the whole case for its consideration of the law and the evidence,' and may consider the matter which the defendant attempted to raise by his belated assignment of error."

This decision was based on the specific statutory provisions, and is not applicable to the case before us.

The petition for a writ of certiorari is hereby dismissed.

HUNTER, J., concurs in result, with concurring opinion.

JACKSON, J., concurs in Hunter's concurring opinion.

IN THE
SUPREME COURT OF INDIANA

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v.

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Respondent.

WRIT OF CERTIORARI
(Filed April 22, 1968)

HUNTER, J., (Concurring Opinion).

I concur only in the result of this case for the following reasons:

This is another in a long series of cases which points up the absolute and pressing necessity for a revision of this Court's post-conviction remedy rules. This matter is now dealt with by Rules 2-40 and 2-40A of the Rules of the Supreme Court of Indiana.

It is my firm belief that, among other necessary modifications, provision must be made in these rules for an evidentiary record to be made during these post-conviction proceedings in the trial court to better enable this Court to review any allegation of abuse of discretion that may be made. Such an allegation is made in the present case but how are we to determine it properly when we have no record before us revealing what took place below? We must resort to presumptions in favor of the trial court with no other basis than some childlike faith in the inherent wisdom of that court. In the absence of a record in these post-conviction proceedings, the burden of proof that is upon the petitioner in the court below becomes an almost irrebuttable presumption on petition for writ of certiorari. For how can we say the court below committed an abuse of discretion if we have nothing be-

fore us from which we can determine the basis of the discretionary action complained of?

Until some change in the rule is wrought, a petition for writ of certiorari on the grounds alleged in this case will continue to be a useless exercise in futility for both the petitioner and this Court.

JACKSON, J., Concurs.

APPENDIX B

IN THE

SUPREME COURT OF INDIANA

No. 268S23

RICHARD JEWELL NEWLAND,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITON FOR REHEARING

(Filed May 10, 1968)

The appellant petitions the Court to grant a re-hearing in the above entitled cause.

The appellant respectfully represents that the Court erred in its opinion and decision in the following respects:

1. In holding that petitioner failed to show that he exercised due diligence as required by Supreme Court Rules 2-40 and the trial court did not abuse its discretion in failing to grant permission to defendant to file a belated motion for a new trial.

A concise statement of the reasons the decision is thought to be erroneous is as follows:

1. That this Court failed to give a statement in writing and in failing to give a decision thereon of a substantial question arising in appellant's petition, to-wit: as to whether the trial court erred in failing to give permission to file belated motion for new trial because of newly discovered evidence as alleged in Exhibit "C" of petitioner's verified writ of certiorari.

2. That this Court erroneously rendered a decision on a point of law raised solely by respondent, to-wit: whether petitioner was diligent in discovering cause.

3. That this Court had no actual evidence to base its decision on except statements by attorney for respondent in their response to the petition for writ of certiorari.

/s/ DEAN E. RICHARDS
DEAN E. RICHARDS,
Attorney for Appellant.

DEAN E. RICHARDS

and

BUTLER, BROWN, HAHN & DE WITT
4th Floor Inland Building
156 East Market Street
Indianapolis, Indiana 46204
Phone: 632-9411.

APPENDIX B-1

ORDER DENYING REHEARING

RICHARD JEWELL NEWLAND v. STATE OF INDIANA

No. 268S23

You are hereby notified that the Supreme Court has on this day denied Appellants Petition for Rehearing.

Mote, J. not participating, Lewis, C. J.

Witness my name and the seal of said Court,
this 12th day of June, 1968.

KENDAL E. MATHEWS,
Clerk Supreme and Appellate Courts.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 452

RICHARD JEWELL NEWLAND,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

JOHN J. DILLON
Attorney General of Indiana,
JOHN F. DAVIS
Deputy Attorney General
Attorneys for Respondent.

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Phone 317/633-5512

C. E. Pauley & Co., Inc., Indianapolis

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 236 N. E. 2d 45.

JURISDICTION

While the jurisdictional requisites are adequately set forth in the petition, Respondent will contend that this court should not assume jurisdiction because the judgement complained of was based on separate and independent state grounds.

QUESTIONS PRESENTED

Whether requiring a petitioner to show due diligence in petitioning for a belated motion for a new trial is a violation of his constitutional rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment 14, § 1 of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Rule 2-40 of the Indiana Supreme Court

> **Grounds for writs of error coram nobis shall be included in motion for a new trial.**—Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefore is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.
>
> Trial counsel representing a defendant or the defendant pro se shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this court. If no timely motion for a new trial is filed by a de-

fendant's trial counsel or by the defendant pro se, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiescence in, and an acceptance of, the judgment of the trial court by the defendant.

Time limitations with reference to motions for a new trial shall be applicable hereto. Provided, however, if the moving party first obtains knowledge of an alleged ground after the time within which a motion for a new trial may be filed, such party may file a petition requesting permission to file a belated motion for a new trial, which motion shall be attached to said petition. Not more than one [1] belated motion for a new trial in the same case may be entertained or considered by a court unless the subject matter of the action had not come or could not come by the exercise of diligence to the knowledge of the petitioner at the time of the filing of such belated motion for new trial. The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.

The attorney-general of the state of Indiana and the prosecuting attorney of the judicial district wherein such petition is filed shall be given notice of the filing of the petition and thirty [30] days' time within which to answer same. A copy of the petition shall be served with the notice.

In the event a belated motion for new trial is filed in forma pauperis, it shall be the duty of the

public defender of the state of Indiana to represent the petitioner in said proceedings, if he, after diligent inquiry, finds merit thereto, subject, however, to the provisions of Rule 2-40A infra.

Affidavits may be filed with and in support of or in opposition to petitions for belated motions for new trial and motions for new trials and shall be considered as evidence without introduction thereof. The court may hear additional evidence at its discretion. The petition and affidavits filed in support thereof or in opposition thereto shall be a part of the record without a bill of exceptions. The parties thereto shall not be entitled to a change of venue from the county or change of judge.

This rule shall be applicable only to criminal proceedings. (Adopted May 29, 1945, in State ex rel. Emmert v. Hamilton Circuit Court, 223 Ind. 418, 61 N. E. (2d) 182; amended and in force Dec. 20, 1952; amended and in force Sept. 11, 1963.)

3. Rule 2-40a of the Indiana Supreme Court.

Review by certiorari.—Rulings on petitions to file belated appeals, ruling on petitions to file belated motions for a new trial and rulings on belated motions for a new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for writ of certiorari in the Supreme Court of this state.

A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the attorney-general at the time of filing. To this petition the attorney-general shall file a response under oath admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, to-

gether with brief in support thereof. If there is a conflict as to the statement of the record below, this court may direct the clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this court.

If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evidence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

It shall be the duty of the public defender of the state of Indiana to represent indigent persons who are inmates of penal institutions of the state of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petitions for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after diligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the public defender to represent any petitioner in such cases (as provided in Rule 2-40A, supra), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the court shall determine whether or not an order shall issue requiring the public defender to represent the petitioner.

In the event proceedings are in forma pauperis, no costs shall be taxed against petitioner for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

The petition and brief for writ of certiorari shall be filed within sixty [60] days after the ruling complained of, and the response thereto within thirty [30] days after the filing of the petition for the writ. The petitioner may file a reply brief within ten [10] days after the filing of the response. No other briefs or pleadings shall be filed. Six [6] copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

The court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

Provided further, that where the petition for the writ does not meet with the rules of this court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

This rule shall be applicable only to criminal proceedings. (Adopted Sept. 25, 1953, effective in cases filed after Jan. 1, 1954; amended and in force Sept. 11, 1963.)

STATEMENT OF CASE

Petitioner had a review of his conviction by direct appeal. He later filed a petition for permission to file a belated motion for a new trial in the trial court. Petition for permission was granted, a hearing was held and his belated motion for new trial was denied. He then filed his "Second Verified Petition for Permission to File a Belated Motion for New Trial" which was denied. He then filed a petition for writ of certiorari in the Indiana Supreme Court. Certiorari was denied. He then filed a petition for rehearing in the Indiana Supreme Court which was denied.

Petitioner is now appealing the denial of his Petition for Writ of Certiorari by the Indiana Supreme Court.

SUMMARY OF ARGUMENT

Petitioner has presented no constitutional question for review. While he states that Indiana Supreme Court Rules 2-40 and 2-40a do not comply with *Brown* v. *Lane,* he does not show how *Brown* applies to his case.

Rules 2-40 and 2-40a apply alike to pauper petitioners, petitioners represented by the Public Defender and petitioners represented by counsel. These Rules, applied to petitioner, do not constitute a denial of equal protection.

The questions raised in the petition are not directly reviewable by certiorari because they rest on separate and independent state grounds.

ARGUMENT

THE PETITION RAISES NO QUESTIONS FOR REVIEW

Rule 2-40 of the Indiana Supreme Court provides in part:

> "The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence".

The trial court denied Petitioner herein permission to file a belated motion for a new trial. He then filed a Petition for Writ of Certiorari in the Indiana Supreme Court to review this decision. In his petition for Writ of Certiorari

in the Indiana Supreme Court, he attached "Second Verified Petition for Permission to File a Belated Motion for New Trial" and denominated it "Petitioner's Exhibit B". The allegations of due diligence contained in his petition for permission to file a belated motion for a new trial were, therefore, before the Indiana Supreme Court when they reviewed the decision of the trial court. In denying the Writ of Certiorari, (the ruling now complained of), the Indiana Supreme Court stated:

> "In a petition for permission to file a belated motion for a new trial, the trial court has discretion in ruling upon the Petition and may be reversed only for an abuse of that discretion, and this rule applies when the trial judge determines whether the Petitioner exercised due diligence in filing the petition. *Barrett* v. *State of Indiana, supra.*
>
> "In the petition for certiorari petitioner has not shown how the trial judge abused his discretion. Furthermore, the petitioner's mere allegation that he, in fact, used diligence is insufficient in the face of the previous determination of the trial judge". *Newland* v. *State* (1968) 236 N. E. 2d 45, 46.

The Indiana Supreme Court denied his petition for the reason that he had not shown that the trial court had committed an abuse of discretion.

It is difficult from reading Petitioner's "Questions Presented" and "Argument" to determine exactly what denial of a Constitutional right is being complained of. He has admittedly had a trial on the merits, with counsel; a direct appeal with counsel and transcript; a hearing on his petition to file a belated motion for new trial, represented by counsel; a review of the denial of his petition for a be-

lated motion for new trial in the Indiana Supreme Court, and a review again on a Petition for Rehearing.

He appears to be trying to bring his case somehow within the proscriptions of the rules of *Lane* v. *Brown*, 372 U.S. 477, *Fay* v. *Noia*, 372 U.S. 391 and *Johnson* v. *Zerbst*, 304 U.S. 458. He fails, however, to show the applicability of these cases to the case at bar.

It is not enough for him to complain, as he does, that Rules 2-40 and 2-40a do not comply with *Lane* v. *Brown*, Even if this were true (which it is not) he must show how *he* was denied some constitional right.

Respondent is not certain what point Petitioner is trying to make in his "Questions Presented" and "Argument". It appears that he is saying that Rule 2-40 denied him equal protection of the law; that there is an invidious discrimination made between petitioners with counsel and pauper petitioners, in favor of pauper petitioners. This idea, while novel, is incorrect. Rule 2-40 requires that *all* petitions for permission to file a belated motion for a new trial must show due diligence in the application. This applies to pro se petitioners and petitioners represented by the Public Defender as well as petitioners represented by counsel.

There is nothing in Rules 2-40 or 2-40a which exempts petitioners represented by the Public Defender from showing due diligence in the petition (see complete text of Rules 2-40 and 2-40a).

Finally, the finding by the Indiana Supreme Court that the petitioner did not show that the trial court had abused its discretion is not properly before this Court for direct review by Certiorari.

In *Fay* v. *Noia*, 372 U.S. 391, 428, this Court stated:

> "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds."

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana,
JOHN F. DAVIS
Deputy Attorney General
Attorneys for Respondent.

OFFICE OF ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Phone 317/633-5512